United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-2038

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES ex rel. ANTHONY BRUNO, :

Petitioner-Appellant, :

-against- :

J. EDWIN LaVALLEE, Warden of Clinton Prison, Dannemora, New York, :

Respondent-Appellee. :

:

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK :

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Pls

BRIEF FOR RESPONDENT-~~APPELLANT~~ APPELLEE

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UNITED STATES COURT OF APPEALS
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BRIEF FOR PETITIONER-APPELLANT

Preliminary Statement

This is an appeal from a denial of the petition for a writ of habeas corpus (Platt, J.) on April 15, 1975 in the District Court for the Eastern District of New York.

Prior State Court Proceedings

Petitioner herein with two other defendants was indicted on April 25, 1947 (Ind. # 842-1947) for the crimes of Robbery, First Degree, Grand Larceny, First Degree, Assault, Second Degree (Indictment Appendix, p. 32).

Petitioner was convicted on September 12, 1947, after a jury trial, of Robbery in the First Degree, Grand Larceny in the First Degree and Assault in the Second Degree, by the County Court of Kings County (Leibowitz, J.). Petitioner was sentenced as a third felony offender to a term of 30 to 60 years. On April 19, 1948 the Appellate Division, Second Department unanimously affirmed the conviction without opinion (273 App. Div. 977). Subsequently, on June 2, 1961, petitioner was resentenced by Judge Leibowitz as a second felony offender, but the same sentence was imposed.

This trial and conviction followed a mistrial before Goldstein, J. of the same court declared on May 22, 1947.

Subsequent to his conviction in the Kings County Court, petitioner made numerous applications for coram nobis relief, raising the issue of identification. In an application verified on July 31, 1962, petitioner contended that witness DiBari committed perjury in identifying petitioner as one of the assailants, and that DiBari was incompetent as a witness because his eyesight was poor. This application was denied by Judge Leibowitz on September 11, 1962.

In an application filed in May, 1963, petitioner contended that his defense counsel was incompetent because, inter alia, he failed to explore why DiBari wore thick glasses (See T.M. 80-83). Judge Leibowitz denied this application on June 18, 1963. A similar application was denied by Judge Leibowitz on September 16, 1963, and the

Appellate Division, Second Department affirmed without opinion on March 2, 1964. Judge Burke of the New York Court of Appeals denied leave to appeal on June 1, 1964.

In an application filed by petitioner in March, 1970, petitioner claimed that DiBari committed perjury at the trial because his testimony conflicted with the complaint filed in the Magistrates' court, and because he had refused to testify at an earlier trial, which resulted in a mistrial. This application was denied by Justice Damiani on November 17, 1970. Petitioner filed a similar application in January, 1971 alleging, inter alia, that DiBari was the sole identification witness, and that DiBari was "blind", having a visual capacity of 45-55. This application was denied by Justice Mangano on June 15, 1971 on the ground that it presented the same issues that had been resolved against petitioner by Justice Damiani's decision of November 17, 1970.

In an application filed by petitioner in May, 1972, petitioner contended that he was denied his constitutional rights under Stovall v. Denno, 388 U.S. 293 and Gilbert v. California, 388 U.S. 263, because he was identified by DiBari at a police station without a lineup. This application was denied by Justice Rinaldi on June 16, 1972, and a motion for a reargument was denied on August 22, 1972.

Prior Federal Court Proceedings

Petitioner-appellant was also involved in extensive proceedings in the United States District Court for the Northern District of New York, on an issue concerning the clearing of the courtroom by Judge Leibowitz during petitioner's trial. These proceedings involved two evidentiary hearings before District Judge Foley (See 246 F. Supp. 363, and 271 F. Supp. 491), and two appeals to the Court of Appeals for the Second Circuit

(See 368 F. 2d 187 and 408 F. 2d 125, cert. den. 397 U.S. 957). The Court of Appeals ultimately ruled that the clearing of the courtroom during petitioner's trial did not prejudice petitioner's defense, and did not deprive him of a fair trial.

The Trial in County Court

The crime for which petitioner was convicted, was the nighttime robbery of a coal company in Brooklyn, New York, on December 12, 1946. The salient testimony at petitioner's trial was as follows:

Vincent DiBari, a night watchman at the Cirillo Brothers Coal Company, testified that he went on duty at 6 P.M. on the evening of December 11, 1946 (T.M. 62).* After checking on the door locks of the establishment, and finding them closed, he returned to the shipping room (T.M. 63). The entrance to the shipping room is at the

* T.M. refers to the minutes of petitioner's trial which are being filed herewith as part of the Appendix.

top landing of three steps leading into a garage. The entrance door opens towards the room from the garage (See Exhibit 4, annexed to trial minutes).

Shortly after midnight, one of the telephones in the shipping room rang three times. DiBari picked up the telephone, but there was no response (T.M. 63). About five minutes later he heard footsteps in the coal yard, a "crunching noise", of "somebody walking in the coal dust." (T.M. 64). He removed the latch from the shipping room door to go out into the coal yard, and as he opened the door, he saw three men facing him. All three men were standing on the top landing of the entrance to the shipping room, at a distance of about two feet from DiBari (T.M. 64-67, 92). Two men were in the back, and one was in the front (T.M. 89).

The shipping room was lighted at the time, one clear light of 150 watts suspended from the ceiling in an inner office (T.M. 57, 66). The light was about twenty feet away, and was behind DiBari as he faced the

three men (T.M. 84). There were also lights near the front of the garage, "always on at night" (T.M. 85). At the trial, DiBari identified the three men as petitioner, and his co-defendants Dominick Carlucci and Louis Loffredo (T.M. 68).

The three men wore no disguises, and DiBari said that he was not looking at their clothing, but at their faces (T.M. 68, 69). One of the men, later identified as Loffredo, took a gun out of his pocket and held it at DiBari's stomach (T.M. 68-69, 89-90). Under cross-examination, asked to estimate the time that elapsed from the moment he first encountered the three men in the doorway until they turned him around to face the wall, DiBari first said that he "could not say"; pressed for a more definite answer, he said, "about a minute" (T.M. 96). Asked whether he knew how long a minute was, he said, "I don't know just exactly". Asked to demonstrate by means of a clapping of the hands, the time that elapsed was fixed at "about three second" (T.M. 96-98). On redirect examination, however, DiBari said, "I could not tell exactly how long it took. How can I guess? I don't know how long it took." (T.M. 109).

When Loffredo pointed the gun at DiBari's stomach, he ordered DiBari to sit down and face the wall (T.M. 69, 70). The assailants tied DiBari's hands behind his back, and kept him in a chair for about ten or fifteen minutes (T.M. 71, 72). During this time, he heard noises in the room directly above where the safe was located and heard "something being moved" (T.M. 72). Then he was ordered to go to the garage with his hands still tied, and he was directed to sit facing the wall with one of the assailants standing in back of him (T.M. 73). One of the men, later identified as Carlucci, then tied his legs and further secured his hands (T.M. 75). After warning DiBari to stay there for ten minutes, they left. DiBari heard an automobile outside begin to start up, and he untied himself and called the police (T.M. 76).

Subsequently, in April, 1947, DiBari identified the three assailants at a Brooklyn police station (T.M. 77-78). The three men were in a room, and DiBari

said he looked only at them, although there may have been two other men present (T.M. 105-106, 109). Later that night, DiBari identified the assailants at another police station, in the presence of an assistant district attorney (T.M. 79).

The prosecutor acknowledged that when DiBari made his initial complaint in the county court concerning the robbery, the complaint stated as follows: "The defendant Loffredo took either a revolver or a pistol from his pocket and pressed it against deponent's back and told deponent not to look around, and put deponent in a chair facing the wall." (T.M. 92). Upon being confronted by defense counsel with this statement, DiBari replied, "How could he have put it in my back if I was facing him?", "That is maybe after he turned me around he had the gun in my back." "If he put it in my back how could I see it? I would not be able to see the gun." (T.M. 92). DiBari further stated that when the assailants came to the door they were facing him, and that when Loffredo pulled out the gun he was

facing him, and that after Loffredo turned him around, he put the gun to his back (T.M. 95-96). DiBari said that when he filled out the complaint in the clerk's office he was asked to tell the story as it happened, and he said it the way it came to his head at the time; but, he said, "if you ask me more questions, I give you more answers" (T.M. 96).

In addition to DiBari's testimony, the prosecution relied prinicipally on the testimony of Peter Cirillo, vice-president of the Cirillo Coal Company, to corroborate that a crime had been committed. Cirillo testified that he arrived at the scene of the robbery at 6:30 a.m. on the following morning, and noticed that the door leading to the main office upstairs had been jimmied open, the safe was in the bathroom with the door pried open and the papers strewn all over, and $3,500 in cash and $10,500 in bonds and coupons were missing (T.M. 58-59, 52).

Petitioner and his co-defendants did not offer any testimony in their defense (T.M. 128).

POINT I

THE URGING OF THE WITNESS TO TELL THE TRUTH BY THE JUDGE PRESIDING AT THE MISTRIAL DID NOT CONSTITUTE A DENIAL OF A FAIR TRIAL.

Petitioner seeks to set aside his conviction on the ground that DiBari committed perjury at the trial. Petitioner alludes to the fact that a mistrial was declared (with the consent of both sides) at his first trial because DiBari refused to identify the assailants because he feared for his life (Appendix, pp. 5-15). Subsequently, the District Attorney moved to have DiBari committed as a material witness, in lieu of $50,000 bail pending a second trial because DiBari's life was in jeopardy. DiBari stated that he would not tell the truth if he were called to testify again. Excerpts from the court's record are as follows:

> "THE COURT [Judge Goldstein]: I am going to give you the protection that the court thinks you are entitled to, and at the same time I also want to warn you that if you do not stick to the truth in this case, and tell exactly what happened, and what you told

before the Grand Jury with reference to these three notorious gunmen and robbers. If you want to take their place in this courtroom, and be a defendant, instead of these three notorious gunmen and robbers, that have records as long as your arm, I will give you that opportunity. I will hold you in $50,000 bail. . .and if any one attempts to come near your or to your home, I want you to notify the police, and for your information, I will also tell you this, and for your peace of mind, that these three gunmen will be held in Queens County on another robbery case, where they shot a policeman and almost killed him, and they have got their identification there too, and if there is any more 'fixing' to be done, at least in your own case, you ought to have your conscience clear, that you are going to come across and tell the truth.

MR. DiBARI: I am telling the truth, * * *I did not get 'fixed up' in this thing here.

THE COURT: That is the reason I had to declare a mistrial here because of your attitude.

MR. DiBARI: I told you before so I won't put you in any trouble or anybody else here. I don't want you to continue with a case where I know I will lie. I told you before I do not want to lie in a case* * *I am telling you I am not going to testify. I don't care what you do with me.* * * I am not going to stick my head out and get bumped off* * *Put me in jail. I know what I'm up against.

THE COURT:. . .I will hold this man in $50,000 bail, and before any bail is produced, I want to have the application submitted to me before it is approved, because I think you ought to stay in jail until you are ready to testify. I will also give you this assurance; that I will see that the Police Commissioner gives you every police protection that is necessary for your safety. There is no reason why you should take the brunt of this thing because these three gunmen did tie you up, and then robbed the place, and then you come here and say you do not remember how they looked like.

MR. DiBARI: That is what I told you beforehand. I know what trouble I am going to get into* * *I don't want to walk in fear on the street.

THE COURT: I will give you plenty of time to think this over. Submit your order to me, Mr. Helfand, on this matter, and I will have him detained." (See Appendix, pp. 11-15)

The above colloquy makes it clear that witness DiBari was threatening to commit perjury by refusing to identify petitioner, not because he was unsure of his identification, but because he feared that his life would be in danger if he took the witness stand. The conclusion is inescapable that DiBari's in-court identification was not coerced by the District Attorney (See App., p. 202) or by Judge Goldstein (See App., p. 217c), as alleged by petitioner, but rather that DiBari overcame his fear of what he perceived to be a great personal risk, in order to identify petitioner at trial. Indeed, the clearing of the courtroom by Judge Leibowitz, which was upheld by the Court of Appeals, was based on his perception that spectators in the courtroom grinned and grimaced at DiBari, causing him to turn white and become speechless (See 408 F. 2d at 127).

Petitioner in Point I of his brief, cites a number of cases which generally stand for the proposition that while trial court judges have an active roll to play in search for the truth, they must take great pains to avoid being or appearing partisan.

In most of the cases cited, where it could be determined from the reported decisions, the cases were reversed and remanded for a new trial. The judge's conduct in the presence of the jury in each case required that such determination be made.

In the instant case, the conduct of Judge Goldstein occurred during a mistrial of the petitioner. After declaring such mistrial with the consent of both parties, the petitioner was convicted by a jury during a trial presided over by Judge Leibowitz. This petition stems from that conviction and there is no similar conduct on the part of Judge Leibowitz about which the petitioner complains.

Petitioner seeks to extend the influence of the actions of Judge Goldstein at the mistrial to the subsequent trial by maintaining that the witness DiBari was convinced by the judge's actions that the defendants were indeed malfactors of society. In view of his experience, DiBari needed no such convincing. This speculation is merely an attempt to impose the alleged trial error by one judge upon the subsequent trial record of the petitioner.

Furthermore, the effect of Judge Goldstein's actions, in declaring a mistrial and setting the case down for a subsequent trial was analogous to what the appellate courts did in the cases cited by petitioner when those courts reversed the conviction and removed the case for a new trial.

In a similar situation, it has been held that the trial judge's remarks to a defense witness made outside the presence of the jury on the possible consequences of perjury was within the discretion of the court and did not constitute a denial of due process. Mooney v. United States, 320 F. Supp. 316 (E.D. Mo. 1970).

It is apparent then that the actions of Judge Goldstein prior to declaring a mistrial did not deny the petitioner a fair trial.

POINT II

THE FACTUAL DETERMINATION OF THE TRIAL JURY WITH RESPECT TO PETITIONER'S IDENTIFICATION SHOULD NOT BE DISTURBED IN VIEW OF THE THOROUGH CHARGE GIVEN BY THE TRIAL JUDGE.

In his instant appeal, petitioner-appellant contends agains that the identification of him by witness DiBari was tainted because DiBari saw him at two police station confrontations without a lineup, and because DiBari stated in his complaint in the Magistrates' court that the assailants pointed a pistol at his back and told him not to turn around. These issues were thoroughly explored at petitioner's trial during the cross-examination of DiBari by defense counsel, and in Judge Leibowitz' charge to the jury set forth infra. In addition, the issue of identification was the first point raised in petitioner's direct appeal to the Appellate Division in 1948.

In his charge to the jury, Judge Leibowitz clearly raised the issue of the inconsistency between DiBari's statement in his felony complaint and his testimony at trial:

> "Now, with reference to this complaint in the Magistrates' Court, if you find there is anything in there that is contradictory of what the witness said here, which contradiction has not been explained to your satisfaction by the witness then you may consider such contradiction, if any, in judging the credibility of the witness - in other words, in determining the force and effect and the credibility, the reliability, and the accuracy, of what he says in here. On the other hand, if you are satisfied that he has given a satisfactory and proper explanation of how he came to omit, as he claims it, the reference to placing of the gun in the vicinity of his abdomen, then of course the contradiction may be considered by you in another light.
>
> If you find that any witness has wilfully testified falsely as to any material fact in the case, you are at liberty to disregard that witness's entire testimony. On

> the other hand, you are not bound so to do. You may accept that part of his testimony which you may find to be true and disregard that which you find to be false." (T.M. 137-38).

In addition, Judge Leibowitz charged the jury very carefully on the issue of DiBari's identification of the defendants. This portion of the charge appears at pages 146-147 of the trial minutes, and the significant parts are as follows:

> "I charge you. . .that, in considering the testimony of DiBari concerning his identification of the defendants as the men who is said to have committed these crimes, you must bear in mind the following two questions: Is the witness truthful? You must consider, as I have already indicated, whether the witness is swayed by any motive to testify to anything but the truth. . .I charge you further that you must determine whether or not the identification is accurate and reliable. In that regard you must consider all the circumstances under which the identification was made. You must consider the opportunity that DiBari had to observe the culprits at the time of the commission of the alleged crimes, for how long a period was each of the culprits under observation, how close did DiBari get to

the culprits, what was the condition of the light; and then again, are the faces of the culprits such as would make a definite impression upon the mind of the witness DiBari. You must also consider, upon the subject of accuracy, the length of time that intervened between the date of the commission of the alleged crimes and the occasion when DiBari saw the defendants at the time of the arrest, as having some bearing, undoubtedly important, on the probability that he could remember the faces of the defendants after such a lapse of time. You must also take into the witness' own capacity for observation, and his memory, and all other tests and standards, in addition to those I have already enumerated. . . I charge you, in unmistakeable English, that there is necessity for the use of utmost caution and the utmost precaution in weighing proof as to identification. It must be with sufficient certainty so as to preclude a reasonable possibility of mistake.

A question that is probably going to be considered by you at great length is the question of identification. If you are not satisfied of the accuracy of DiBari's identification, beyond a reasonable doubt, then you must acquit the defendants. On the other hand, if you are satisfied beyond a reasonable doubt that DiBari has not only told

> the truth as to what happened that night, but is also accurate in the identification of these defendants, then you have a right to bring in a verdict of guilty, if from all of the evidence in the case you find that each and every element of the crime charged has been established beyond a reasonable doubt." (Emphasis added)

The trial court's charge to the jury has been set forth in detail to illustrate that the issue of identification was paramount in the jury's deliberations of petitioner's guilt or innocence.

It is an elementary principle of federal habeas corpus that "[i]t is not the function of a habeas corpus proceeding in the District Court to afford a procedure for the retrial of the issues of a criminal case previously litigated and determined in the state courts, nor can it be used as a substitute for appeal." Dye v. Sacks, 279 F. 2d 834, 836 (6th Cir. 1960). In the instant case the issues which petitioner now raises were resolved against him by a trial jury, and petitioner should have

the burden of establishing by convincing evidence that the factual determination of the jury was erroneous. See 28 U.S.C. § 2254(d) and LaVallee v. Delle Rose, 410 U.S. 690 (1973). Petitioner has not come forward with any convincing evidence that the jury erred in its determination, but simply re-asserts the same grounds for DiBari's unreliability that was considered by the jury itself. Judge Platt, in his decision in the court below, summarized the status of the law with respect to the reliability of eyewitness testimony when he observed, "It has long been established that 'the result of the witness' observation need not be positive or absolute certainty. . .; it suffices if he had an opportunity of personal observation and did get some impressions from this observation. 2 Wigmore, Evidence § 658 (3d Ed., 1940). As the Supreme Court noted in Stovall v. Denno, 338 U.S. 293, 299-300, 87 S. Ct. 1967, 1971, 19 L. Ed 2d 1199 (1967). "The overwhelming majority of American courts have always treated the evidence question [of eyewitness identification] not as one of admissibility but as one of credibility for the jury."

Since the jury was charged by the trial judge that it must acquit petitioner and his co-defendants if it was not satisfied beyond a reasonable doubt of the accuracy of DiBari's identification, the instant petition should be dismissed under the principle that federal habeas corpus cannot be used to relitigate the issue of guilt or innocence.

Furthermore, petitioner's application cannot be sustained as a matter of law because petitioner has not demonstrated by a preponderance of evidence that he was a victim of mistaken identification. An identification procedure violates due process of law only when it is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Simmons v. United States, 390 U.S. 377, 384 (1968). The required inquiry involves a two-pronged test to determine whether the identification procedure was impermissibly suggestive, and whether under the totality of the circumstances it has such a tendency as to give rise to a substantial likelihood of irreparable misidentification that to allow the witness to make an in-court identification would violate due process. United States ex rel. Bisordi v. LaVallee, 461 F. 2d 1020,

1023 (2d Cir. 1972); United States ex rel. Phipps v. Follette, 428 F. 2d 912, 914-15 (2d Cir. 1970), cert. den. 400 U.S. 908 (1970). Phipps teaches that the court must look to the witness' initial opportunity for observation, whether the witness was motivated to make a careful observation, whether the witness was a bystander or a victim of the crime, whether the witness was certain of his identification, whether the witness was influenced by viewing the defendant at counsel's table during the trial, and whether the in-court identification was affected by the lapse of time between the challenged identification and the trial (See Phipps at 915).

Applying these principles to the instant case it is clear that petitioner's claim of misidentification is without merit. While the trial record does not fully elucidate the circumstances surrounding DiBari's viewing of petitioner at two police stations (DiBari testified that one of the viewings of the three assailants took place with two other unknown men in the room (T.M. 106), but he also testified that he only noticed the defendants (T.M. 109), DiBari's overall trial testimony indicated that he had ample opportunity to observe petitioner and his accomplice during the commission of the crime.

Thus, DiBari, confronted petitioner and his accomplices at a distance of two or three feet, as they stood in the doorway of the Cirillo Coal Company, and ordered him at gun point to be seated and to face the wall. DiBari said that he looked at the faces of the assailants, and that they were not wearing any disguises. Since he was the victim of the crime rather than a passing bystander, DiBari was naturally motivated to make a careful observation of the robbers in order to assist his employers in recovering their losses (DiBari called the police immediately after the robbers left the premises). DiBari was subjected to extensive cross-examination at trial, including his ability to read the clock on the courtroom wall and his ability to describe the spectators in the audience (T.M. 82-83), and he remained steadfast in his belief that petitioner and his co-defendants were the men who robbed him. The existence of the sound independent in-court identification is sufficient to deny the petition here, whether or not the pre-trial identification was improper. See Braithwaite v. Manson, 527 F. 2d 363, 369 (2d Cir. 1975), cert. granted, 425 U.S. 957 (1976); United States v. Evans, 484 F. 2d 1178, 1186 n. 8 (2d Cir. 1973).

While the amount of time between the challenged confrontations and the trial (approximately one and half months) was less than the time between the challenged confrontations and the robbery (slightly less that four months), the total time between the robbery and trial (approximately six months), was not so extensive as to warrant a finding of unreliability on this ground. In a number of cases the courts have upheld in-court identifications where the challenged identification was closer in time to the trial then to the events of the crime. See, e.g., United States ex rel. John v. Casscles, 489 F. 2d 20 (2d Cir. 1973)(showing of defendant's photograph to prosecution witness one month before trial did not result in irreparable misidentification); United States ex rel. Johnson v. Dept. of Correctional Services, 461 F. 2d 956 (2d Cir. 1972)(showing of defendant's photograph to prosecution witness two months prior to trial did not violate due process). Cf. Neil v. Biggers, 409 U.S. 188 (1972)(no substantial likelihood of misidentification in spite of seven month lapse between crime and police station showup). In the instance case,

the time lapse between the December robbery and the May trial was sufficiently short to warrant the conclusion that DiBari's identification of petitioner at trial was based on his observations at the time of the crime, and not his observations at the police station.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
May 26, 1977

Respectfully submitted,

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Attorney for Respondent-
Appellee

GERALD J. RYAN
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

NORBERTA MONTALVO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for respondent herein. On the 1st day of June , 1977 , she served the annexed upon the following named person :

Cahill Gordor
Attn: Kathleen P. March
80 Pine Street
New York, New York 10005

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Norberta Montalvo

Sworn to before me this
1st day of June , 1977

Assistant Attorney General
of the State of New York